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Report of the United Nations Commissioner for Human Rights**

Summary

The present report focuses on legal protection of economic, social and cultural rights. It describes how the nature of these rights is similar to civil and political rights, noting that modern conceptions of human rights perceive rights in terms of rights of the individual to be free from State interference and the abuse of State powers — freedom from the State — as well as rights to State intervention — freedom through the State. This similar nature does not necessarily require the same strategy for protecting all human rights.

Strategies to promote and protect human rights should be multidimensional, covering a range of legal, administrative, financial, budgetary, educational and social measures. However, legal protection of economic, social and cultural rights must be an essential element in this strategy, particularly given the recognition of these rights in legally binding treaties and because of increasing proof that legal protection is effective. The first step in legal protection is the recognition of economic, social and cultural rights in domestic law. This can occur through the incorporation of international norms into the domestic legal order and recognition of economic, social and cultural rights in the constitution, in legislation or, in limited cases, by the judiciary. The second step is the provision of remedies. The courts, administration tribunals, quasi-judicial mechanisms such as National Human Rights Institutions or regional and international treaty bodies can provide legal remedies in the case of breaches of economic, social and cultural rights. In this context, the drafting of an optional protocol to the International Covenant on Economic, Social and Cultural Rights should stimulate strengthened legal protection of these rights.

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** The present report was submitted late, in order to reflect the most recent information.

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Introduction

1. The present report is submitted pursuant to General Assembly resolution 48/141 of 20 December 1993. It focuses on the legal protection of economic, social and cultural rights, an issue which I have identified as a priority in both my Plan of Action as well as my Strategic Management Plan for 2006-2007. The report identifies the main means of legal protection, which include the recognition of economic, social and cultural rights in constitutions and through legislation and by the judiciary as well as through the provision of judicial, quasi-judicial and administrative remedies. The report also identifies some of the challenges facing legal protection of economic, social and cultural rights.

2. Legal protection is only one element of any strategy to promote and protect economic, social and cultural rights, albeit an essential one. Strategies to achieve higher protection of economic, social and cultural rights should be multidimensional and include a range of legal, administrative, financial, budgetary, educational and social measures. Pressure and lobbying by civil society, educational programmes and research by national ministries and national human rights institutions, the use of participatory decision-making and budgeting, the identification of indicators and benchmarks all have a significant role to play in bringing about positive change in the protection and promotion of economic, social and cultural rights.

3. My decision to focus on legal protection as an element in a broader strategy to promote and protect economic, social and cultural rights is driven by two principal concerns. First, I believe that, in spite of the inclusion of economic, social and cultural rights in legally binding treaties, legal protection of these rights in practice is considerably weaker than in the case of other rights and should be strengthened. Despite constant political reaffirmation of the interdependence of all human rights, particularly since the 1993 Vienna Declaration and Programme of Action, efforts to protect economic, social and cultural rights are weaker than for other human rights. The Committee on Economic, Social and Cultural Rights stated in its report to the Vienna World Conference on Human Rights that "States and the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action" (A/CONF.157/PC/62/Add.5, para. 5). This still holds true today. It is time to translate the political affirmation of the interdependence of human rights into reality, including through strengthened legal protection of economic, social and cultural rights.

4. My second reason for focusing the report on legal protection is that experience has demonstrated that legal protection of these rights is effective. Economic, social and cultural rights are more and more recognized as creating legal entitlements and legally binding obligations, and increasingly being incorporated in national constitutions and reflected in national legislation. Domestic courts in all regions and across diverse legal systems are developing jurisprudence on a wide variety of economic, social and cultural rights and national human rights institutions are clarifying their role in protecting these rights. At the international and regional levels, treaty bodies have done much to clarify the content of specific economic, social and cultural rights and the legal obligations they create. This, in turn, has improved the recognition and the enjoyment of economic, social and cultural rights and sparked wider discussion on legal protection of economic, social and cultural

rights both domestically and internationally. The immediate benefits of legal protection of economic, social and cultural rights have been the clarification of the normative content of these rights in the national context, increased transparency and accountability of duty-bearers in economic and social fields and the provision of remedies to individuals and groups in the case of violations.

5. Yet, in spite of these advances, much remains to be done to ensure effective recognition and protection of economic, social and cultural rights in law and practice. Importantly, the nature of economic, social and cultural rights as legal rights imposing legal obligations on States is frequently misunderstood, as is their susceptibility to legal protection. The present report therefore describes some of the main aspects of the legal protection of economic, social and cultural rights, with a view to assisting States and other actors in their efforts to strengthen legal protection of these rights.

I. Economic, social and cultural rights as human rights

A. The nature of economic, social and cultural rights

6. Economic, social and cultural rights have been recognized in constitutions and domestic legislation as well as in regional and international treaties. The creation of the International Labour Organization (ILO) in 1919 resulted in the first steps towards protection of these rights at the international level through the recognition of workers' human rights in ILO treaties. The experiences of the Great Depression and the Second World War inspired the comprehensive recognition of economic, social and cultural rights in the Universal Declaration of Human Rights in 1948, later developed in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and other human rights instruments.

7. The Universal Declaration treated all human rights equally, but States began to group rights into the two categories of civil and political rights, and economic, social and cultural rights. Cold War politics during the drafting of the two Covenants was the driving force behind this categorization. While States with centrally planned economies favoured economic, social and cultural rights, countries with market economies championed civil and political rights, and some States doubted whether economic, social and cultural rights could or should be made legally enforceable. Ultimately, States took a decision to draft two separate, legally binding instruments.

8. This categorization of rights also reflected a view that economic, social and cultural rights were expensive and burdensome, requiring the State to take action to promote them, while the realization of other human rights was essentially resource-free. In this context, it is relevant to consider the essentially similar nature of all human rights. Modern conceptions of human rights perceive rights in terms of rights of the individual to be free from State interference and the abuse of State power — freedom from the State — as well as rights to State intervention, particularly through the elaboration of policies and the allocation of adequate resources and assistance — freedom through the State. This dual conception of rights as freedom from and through the State is as valid for economic, social and cultural rights as for other rights. Thus, the social right to adequate housing covers a right to be free from forced evictions as well as a right to receive assistance to

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facilitate access to housing in certain situations. Similarly, civil rights to a fair trial include the right to be free from arbitrary detention as well as the right to legal assistance from the State in certain instances.

9. Although civil, cultural, economic, political and social rights are similar in nature, the same strategies of implementation for all rights are not required. The protection of some human rights might require significant positive action and intervention on the part of the State. For example, rights connected to the administration of justice or participation in the conduct of public affairs or social rights to adequate housing, the highest attainable standard of physical and mental health, or to adequate food would normally require significant positive State action. Nonetheless, these rights also have a negative element requiring States to refrain from certain acts, such as discrimination or the withholding of public goods and services for political reasons. At the same time, economic, social and cultural rights, such as the right to fair wages and equal remuneration for work of equal value, the right to establish educational institutions, the right to take part in cultural life and the right of authors to the moral and material interests in their works clearly require the State to refrain from acts and respect minimum standards in ways that have been associated primarily with civil and political rights.

10. Accordingly, there is no strict division between economic, social and cultural rights and civil and political rights. All rights have negative elements whereby the State must refrain from certain acts while also incorporating positive elements that require the State to take positive steps to ensure the right — the balance between negative and positive emphasis might however differ from right to right. Differences between rights might require different mixes of strategies for their implementation but this should not justify treating rights in separate categories — or denying the importance of legal protection as part of a strategy to implement all human rights.

B. Obligations of States in relation to economic, social and cultural rights

11. A range of regional and international treaties — as well as domestic legislation and constitutions — impose obligations on States to promote and protect economic, social and cultural rights. The expression of general obligations in relation to economic, social and cultural rights differs among international instruments. Some instruments, such as ICESCR, impose obligations on States which are specific to economic, social and cultural rights, taking into account resource constraints, particularly for developing countries. For example, article 2, paragraph 1, of ICESCR requires States parties "to take steps individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant". The obligation under ICESCR to "take steps" is different to the obligations recognized under the International Covenant on Civil and Political Rights (ICCPR), namely, "to respect and ensure" civil and political rights. Other instruments, such as the African Charter on Human and Peoples' Rights, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) or the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) apply the same obligations to all rights without distinguishing between economic, social and cultural rights and

other rights.[1] Notably, the obligation to prohibit discrimination is similarly worded in both ICESCR and ICCPR.

12. It is relevant to examine more closely the obligation on States under ICESCR to "take steps". The recognition of different general obligations under ICESCR in comparison to those under ICCPR has been used to justify different treatment of economic, social and cultural rights and suggest that economic, social and cultural rights do not place immediate obligations on States to implement these rights. It is important to note at this stage that, in formulating the obligations in ICESCR differently from those in ICCPR, States did not intend to deny the legal enforceability of economic, social and cultural rights. Indeed, the Commission on Human Rights explicitly rejected during the drafting process the view that economic, social and cultural rights were not justiciable.[2] More recently, the Committee on Economic, Social and Cultural Rights (CESCR) has considered the nature of the obligations under ICESCR in detail and concluded that the obligations under the Covenant do have legal and even immediate value.

13. In relation to the obligation "to take steps", the Committee, in its general comment No. 3, has indicated that States parties should move towards the goal of achieving the full realization of economic, social and cultural rights within a reasonably short time and as expeditiously as possible after ICESCR enters into force for the State concerned. The means to achieve this include legislation, the provision of judicial remedies, constitutional recognition as well as other appropriate administrative, financial, educational and social measures. Further, the Committee is of the view that States have a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights. If a State fails to meet these minimum core obligations for resource reasons, it must demonstrate that it has made every effort to use what resources are available to attempt to meet these core obligations as a matter of priority. Even where the resources available to a State are demonstrably inadequate, the obligation remains on the State to strive to ensure the widest possible enjoyment of economic, social and cultural rights, including through seeking international cooperation and assistance and by the introduction of low-cost and targeted programmes. For the Committee, the recognition of differing obligations for economic, social and cultural rights in comparison with other rights presupposes a necessary flexibility device for States reflecting the real world, but it should not be misinterpreted as depriving the obligation of any meaningful content.

14. The legal nature of the obligation to take steps towards the progressive realization of economic, social and cultural rights has been confirmed by international and national jurisprudence. In its landmark decision in the *Grootboom* case,[3] the South African Supreme Court applied a test of "reasonableness" to determine whether the Government's housing legislation met the constitutional obligation to achieve the progressive realization of the right to access adequate housing. The Court found that the legislation did not meet the test, as a reasonable part of the housing programme was not directed towards people in desperate need.

15. As a means of clarifying the obligations on States parties in relation to economic, social and cultural rights under the Covenant, CESCR has adopted a typology of obligations. The Committee considers that States parties have obligations as follows:

(a) To respect economic, social and cultural rights — requiring States to refrain from interfering with the enjoyment of economic, social and cultural rights;

(b) To protect economic, social and cultural rights — requiring States to prevent violations of such rights by third parties; and

(c) To fulfil (promote, facilitate and provide) economic, social and cultural rights — requiring States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights.

16. This typology has gained increasing acceptance.[4] Importantly, it draws out the similarities between the obligations on States in relation to economic, social and cultural rights and obligations in relation to other rights — namely, that States carry both positive and negative obligations in relation to all human rights, although the requirement to allocate sufficient resources is more dominant in relation to certain rights.

II. Legal protection of economic, social and cultural rights

17. Having described the legal obligations established by economic, social and cultural rights standards, the following section seeks to explore the following steps in the legal protection of these rights. The first step is their recognition in domestic law. This can occur through incorporation of international norms into the domestic legal order or recognition of economic, social and cultural rights in the constitution, in legislation or, in limited cases, by the judiciary. In some legal systems, the act of ratification of an international instrument is sufficient to ensure legal recognition. The second step is the provision of remedies. The courts, administrative tribunals, quasi-judicial mechanisms such as national human rights institutions or regional and international treaty bodies, can provide legal remedies in the case of breaches of economic, social and cultural rights. The following section briefly describes each of these mechanisms with reference to national experience.

A. Constitutional, legislative and judicial recognition of economic, social and cultural rights

18. Domestic recognition of economic, social and cultural rights is manifested in constitutional provisions, national legislation, as well as in legal obligations voluntarily assumed by States under international treaties. In some legal systems, the act of ratification has the effect of giving constitutional hierarchy to treaty provisions, including those on economic, social and cultural rights. In other legal systems, further action at the domestic level is necessary to ensure legal recognition, for example, by incorporation in the constitution or through legislation. At the very least, ratified international human rights treaties are considered binding upon all States parties, requiring performance of obligations by them in good faith.[5]

19. Constitutional incorporation or recognition of economic, social and cultural rights is a strong and increasingly common way to consolidate these rights in the domestic legal order. It requires domestic law to respect these rights and generally provides for judicial remedies, including through the constitutional court. Constitutional recognition of economic, social and cultural rights can occur at a number of levels, two of which are particularly relevant. First, an economic, social

or cultural right might be recognized as an independent right within the provisions of the Constitution. For example, the constitution might recognize that everyone has the right to work or the right to social security. This form of recognition often affords direct protection with the right being enforceable in the legal system. Alternatively, in some instances, economic, social and cultural rights might be recognized as principles or directives intended to guide the interpretation and application of other constitutional provisions. The Indian Supreme Court has interpreted such provisions as having real significance. While not justiciable in themselves, the Court has used them as interpretative norms, interpreting the justiciable right to life widely to include protection of a range of economic, social and cultural rights and monitoring compliance of the Government with these principles.[6]

20. Legislation also provides an important means of recognizing economic, social and cultural rights at the domestic level. Article 2, paragraph 1, of ICESCR requires that States take steps to realize their obligations under the Covenant "by all appropriate means, including particularly the adoption of legislative measures". The Committee on Economic, Social and Cultural Rights has recognized that "in many instances, legislation is highly desirable and in some cases may be indispensable".[7] Legislation can be used as a means of establishing legal frameworks for the implementation of economic, social and cultural rights. Second, legislation in other domains can be scrutinized prior to adoption to ensure that it complies with international human rights obligations, including those relating to economic, social and cultural rights, thus providing a means of ensuring that other legislation is conducive to the enjoyment of these rights.

21. Using legislation to protect economic, social and cultural rights has several advantages. Importantly, legislation provides a means to clarify the minimum core content of rights and to elaborate the various obligations attaching to these rights. While the general comments of the Committee have gone a considerable way in assisting States in this exercise, they necessarily provide only broad frameworks that require adaptation to the national context. Legislation offers the principal means for doing so. Similarly, legislation can establish a clear procedure for resource allocation that ensures protection of the most disadvantaged, provides transparency and accountability in financial arrangements, avoids overreliance on discretionary decision-making, and allows parliament to resolve transparently competing demands for resources. Further, legislation can provide the means of accountability and redress through the creation of mechanisms of oversight or monitoring and the provision of certain administrative, quasi-judicial or judicial remedies where appropriate. Not only is the provision of a remedy important in itself, the establishment of remedial avenues through legislation can also circumvent any doubts as to the justiciability of economic, social and cultural rights and the appropriate role of judicial and other bodies in protecting these rights. In the long run, legislation should provide the means of preventing violations of economic, social and cultural rights by clarifying obligations of various stakeholders with regard to economic, social and cultural rights and by providing means of redress in the case of breaches of these obligations.

22. The judiciary can also play a role, not only in the provision of remedies, but also in the recognition of economic, social and cultural rights by implying rights in the Constitution or in legislation. Lack of legal protection of economic, social and cultural rights has at times led plaintiffs to frame claims relating to these rights in

terms of civil and political rights in order to have some form of redress for violations. Consequently, judicial and quasi-judicial bodies have provided relief for victims by interpreting civil and political rights — equality before the law, right to privacy, freedom from torture, etc. — to have application in economic and social fields. To give one example, the House of Lords in the United Kingdom has recently considered the situation of asylum-seekers, suggesting that the State may not neglect their economic and social needs to the extent that it could result in inhuman and degrading treatment. One judgment stated that the freedom from inhuman and degrading treatment did not create a general duty to house the homeless or provide for the destitute; however the threshold of "inhuman and degrading treatment" would be crossed where a person had no means and no alternative sources of support and was, by deliberate action of the State, denied shelter, food or the most basic necessities of life.[8] The European Court on Human Rights has also demonstrated that the economic and social rights of applicants can be protected through civil and political rights[9] as has the Human Rights Committee.[10] It is important to emphasize, however, that protection of economic, social and cultural rights through the prism of civil and political rights is clearly piecemeal and merely a stop-gap solution in the absence of effective legal recognition of all human rights.

B. Judicial, quasi-judicial and administrative remedies

23. With legal recognition ensured, a range of judicial, quasi-judicial and administrative mechanisms are suitable to the provision of remedies in the case of breaches of economic, social and cultural rights. Each mechanism has its strengths and weaknesses so that together they complement each other, and the provision of remedies through a mix of mechanisms generally provides the most effective form of legal protection.

24. Judicial protection refers specifically to the protection of economic, social and cultural rights through the courts. In modern democracies, courts play a crucial role in the protection of human rights, serving as impartial arbiters in disputes about rights and obligations, making decisions according to fixed rules of procedure and evidence, and imposing enforceable remedies. Apart from providing redress for victims, for example in the form of compensation for loss suffered as a result of a violation of an economic, social or cultural right, judicial protection can also play a monitoring and corrective role. Thus, judicial protection can result in declaratory orders stating that a particular policy or legislation is incompatible with the State's obligations in relation to economic, social and cultural rights; orders requiring the State to take certain steps to ensure a violation does not reoccur; and, supervisory orders that monitor future actions of the State.[11]

25. While courts have traditionally tended to focus more on civil and political rights, it is relevant to note that judicial protection of economic, social and cultural rights such as workers' human rights, against discrimination in social fields and of at least certain aspects of cultural rights is not new. Moreover, courts are increasingly developing jurisprudence in relation to other economic, social and cultural rights, such as rights to an adequate standard of living, to adequate food, to adequate housing, to education and from discrimination in social fields. Examples can be drawn from courts in Argentina, Brazil, Colombia, Finland, India, Latvia, Portugal, South Africa, the United States of America and others.[12] The growing corpus of case law on a range of economic, social and cultural rights clearly

indicates that economic, social and cultural rights lend themselves to judicial scrutiny and enforcement.

26. However, at times, the most marginalized groups in society, those for whom protection of economic, social and cultural rights presents the greatest challenges, are not always in a position to access justice and seek redress through courts. Significantly, in some jurisdictions public interest litigation has provided a means for organizations to bring claims on behalf of an individual or group.[13] This is not to downplay the potentially fundamental role of courts in protecting all human rights, but to underline the need for a variety of mechanisms and strategies to ensure effective protection of those rights.

27. Ombudsman and national human rights institutions, many of which have quasi-judicial competencies, play an increasingly important role in ensuring legal protection of economic, social and cultural rights. The CESCR, in its general comment No. 10, recognizes the potentially crucial role of national institutions in promoting and ensuring the indivisibility and interdependence of all human rights, and it has consistently recommended States parties to establish independent national institutions, in accordance with the Principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles; see General Assembly resolution 48/134, annex), with a mandate to deal with economic, social and cultural rights as well as other human rights.[14] Apart from the role that national institutions can play in promoting economic, social and cultural rights, many such institutions are empowered to deal with individual complaints, providing a more accessible avenue of redress for violations of economic, social and cultural rights than courts, and to initiate investigations on their own motion into particular cases or broader systemic causes of the denial of economic, social and cultural rights for particular groups in society. National human rights institutions are well placed to scrutinize national laws and administrative acts for their consistency with internationally recognized human rights standards. They also have an important role in monitoring compliance with specific rights and implementation of court rulings pertaining to economic, social and cultural rights. For example, national institutions in South Africa and India have had significant roles in monitoring the implementation by the State of court judgments and in supplementing court orders with more detailed recommendations on implementation.[15]

28. Economic, social and cultural rights are also protected through various forms of administrative review mechanisms, which enable persons to appeal administrative decisions, such as the granting and withdrawal of welfare benefits and other entitlements. Administrative review of decisions can be a quick, effective and relatively low-cost means of resolving individual disputes. To be effective, such review mechanisms should provide for appeals procedures which are independent of the department concerned. The failure to provide an appeal route to an independent review body risks making the review process susceptible to arbitrary decision-making processes where erroneous decisions at the first instance are confirmed by the administrative hierarchy which does not always have the necessary independence from the original decision-making process. Moreover, while administrative review can be a quick and inexpensive means of resolving disputes over social rights, such review is only appropriate for disputes on economic, social and cultural rights concerning administrative decisions, which does not capture all the potential breaches of economic, social and cultural rights. Similarly, disputes

concerning rights recognized in the Constitution, might be more properly resolved through the constitutional or other courts.

29. A number of international judicial and quasi-judicial mechanisms also provide protection of economic, social and cultural rights. At the global level, apart from mandatory reporting procedures whereby States regularly submit the status of implementation of their human rights obligations to critical scrutiny by the treaty bodies, many States have also accepted optional communications procedures under several of the human rights treaties, which empower the treaty bodies to consider individual complaints concerning alleged breaches of human rights.[16] Such communications mechanisms serve as an additional accountability mechanism, allowing individuals to vindicate their human rights at the international level once they have exhausted all available remedies in their own State. While States have not yet adopted a similar mechanism under ICESCR, communications procedures under other human rights treaties provide protection for some economic, social and cultural rights. For example, the Human Rights Committee has dealt with a number of cases concerning non-discrimination with regard to the right to social security.[17] The adoption of an optional protocol to ICESCR should provide comprehensive means of protecting economic, social and cultural rights. At the regional level, mechanisms under regional human rights instruments equally allow for communications from individuals and groups concerning alleged violations of economic, social and cultural rights.[18]

30. The provision of judicial, quasi-judicial and administrative remedies play important roles in ensuring effective legal protection, by providing redress to victims where appropriate and by stimulating greater respect for economic, social and cultural rights. In this regard, there is increasing evidence that judicial protection in particular has had a significant role to play in improving the enjoyment of these rights. In South Africa, the Treatment Action Campaign decision has led to the establishment of one of the most successful and largest programmes in the world to stop mother-to-child transmission of HIV/AIDS. In India, interim orders issued by the Supreme Court have led to improvements in the enjoyment of the right to adequate food through the introduction of food-for-work schemes, midday meals for children and access to food for the poor. In Argentina, court decisions have improved access to safe drinking water and sanitation while in Portugal, a decision of the European Committee on Social Rights has reduced child labour.[19] Legal protection and the availability of effective remedies ensure that duty-bearers can be held accountable, which favours the adoption of measures aiming to facilitate real progress in the achievement of these rights.

III. Challenges to the legal protection of economic, social and cultural rights

31. The previous sections have described the legal entitlements and obligations that arise from economic, social and cultural rights and steps for legal protections which States are employing to meet their obligations in relation to economic, social and cultural rights. This section considers some of the myths and challenges sometimes raised in relation to legal protection of these rights, with a view to clarifying and resolving them.

A. Specificity of economic, social and cultural rights

32. A common claim to justify low levels of legal protection of economic, social and cultural rights is that these rights, as opposed to other human rights, are broadly or vaguely framed and lack the specificity needed for legal protection. At the heart of the claim is the question whether economic, social and cultural rights create legal obligations and can be given legal recognition, and particularly whether they are justiciable — in other words, capable of legal enforcement through judicial or quasi-judicial processes. Having noted above that the nature of the relevant legal obligations does not justify rigid categorization of human rights as fundamentally different, similar arguments are relevant to dispelling claims of vagueness or lack of specificity.

33. First, it is important to note at the outset that some internationally recognized economic, social and cultural rights clearly have sufficient specificity to be legally enforceable. For example, the right to free and compulsory primary education, a parent's right to choose freely educational institutions for their children, the right to the protection of the moral and material interests of authors in their works, the rights to form trade unions, the right to fair remuneration and equal pay for equal work, protections against discrimination and the right to equality between men and women in the enjoyment of their economic, social and cultural rights are clearly sufficiently specific to be susceptible of legal enforcement through judicial and quasi-judicial procedures. Indeed, many internationally recognized economic, social and cultural rights are already subject to judicial enforcement, which tends to refute claims that they are too broadly phrased to attract adequate and effective legal protection.

34. Second, to the extent that some treaty provisions concerning economic, social and cultural rights are broadly framed, the same claim can be directed towards other human rights without calling into question their justiciability. It is enough merely to undertake some textual comparisons. For example, article 25 (a) of ICCPR recognizes the right of everyone to take part in public affairs while article 15, paragraph 1 (a), of ICESCR recognizes the right of everyone to take part in cultural life. Similarly, article 14, paragraph 3, of the ICCPR recognizes the right to legal assistance while article 9 of ICESCR recognizes the right to social security. Yet in spite of these textual similarities, the susceptibility of provisions under ICCPR to legal enforceability has not been called into question while similar provisions under ICESCR have. Indeed, to the extent that provisions are broadly framed, the judiciary and quasi-judicial bodies have a clear role in clarifying and applying those provisions to practical situations to ensure wider understanding of the applicability of rights. Consequently, judicial and quasi-judicial enforcement of economic, social and cultural rights would itself achieve greater clarity and therefore enforceability for these rights.

35. Third, judicial and quasi-judicial bodies have clearly indicated their capacity to deal with legal complexities in relation to civil and political rights and economic, social and cultural rights do not pose any more complicated challenges in this regard. Significantly, judicial and quasi-judicial examination of civil and political rights require complex balancing, for example, of the protection of public morals and public order with upholding individual freedoms such as freedom of expression or the elaboration of what constitutes cruel, inhumane or degrading treatment. There is no apparent greater complexity facing judges and experts in determining the admittedly complex issues arising from the protection of rights in the social field.

B. The role of the judiciary in the democratic order

36. Judicial protection of economic, social and cultural rights has also raised the question of the appropriate role of the judiciary in hearing claims that could involve questions of social policy, distributive justice and resource allocations. This raises questions of the separation of powers and the appropriate role of the judiciary in light of the key role of the legislature and the executive in the area of policymaking and resource allocation. It is, however, important to state that many aspects of the adjudication of economic, social and cultural rights need not necessarily involve questions of policy or resource allocation. The following situations illustrate the sort of questions that would not lead to the judiciary intruding into policymaking or decisions on resource allocation: cases seeking orders that government refrain from taking certain actions — for example, forced evictions; cases seeking orders that government protect an individual against the actions of a third party; and, cases concerning the implementation of existing legislation concerning economic, social and cultural rights.

37. Nonetheless, a court might have to examine a claim that a particular policy or budgetary decision by parliament or the executive breached obligations in relation to economic, social and cultural rights. Different legal systems have different approaches to the doctrine of separation of powers. While some legal systems stress the importance of parliamentary sovereignty, alternative systems expect the judiciary to undertake a stronger role in monitoring government decisions and actions. It is important to stress that both models envisage a balance of power between the judiciary, the executive and the parliament and that differences are more of degree and do not suggest fundamentally different roles for the judiciary in the constitutional order. However, the latter model envisages a more robust role for courts to push the executive and parliament to action. In the case of the former, questions of judicial activism and the appropriate role of the judiciary could arise. The situation could arise where there has been no explicit constitutional or legislative recognition of economic, social and cultural rights, and courts rely on other sources, such as international treaties not considered to be directly part of the domestic legal order, to enforce economic, social and cultural rights. One solution to such problems is to ensure legal protection through legislation, which has the advantage of defining the appropriate role of the judiciary.

38. Similarly, a situation could arise where there has been some broad legal recognition of economic, social and cultural rights, for example, in the Constitution, and a particular case comes before a court requiring enforcement of that right. Courts of course have constitutional authority to interpret and apply constitutional and legislative provisions. However, this situation does raise the question of the appropriate extent of judicial powers in interpreting and applying economic, social and cultural rights that can impact on decisions of the parliament or the executive relating to social policy or the allocation of available resources.

39. The South African Supreme Court has confronted this problem directly, noting its complexity, while assuming its role under the Constitution. In *Minister of Health and Others v. Treatment Action Campaign and Others*, the South African Court of Appeal stated that: "This Court has made it clear on more than one occasion that although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the

others. All arms of government should be sensitive to and respect this separation. This does not mean, however, that courts cannot or should not make orders that have an impact on policy". The court concluded that a case concerning economic, social and cultural rights could require a court to evaluate State policy and to pass judgement on whether it is consistent with the Constitution.[20]

40. While it is important to consider the appropriate role of the judiciary in protecting economic, social and cultural rights where policy and budgetary considerations are involved, it is also relevant to note that these questions also pertain to the adjudication of other rights. For example, in *R. v. Askov*,[21] the Supreme Court of Canada noted that a delay of two years between committal for trial and the trial was a breach of the right to be tried within a reasonable time. The court held that the lack of institutional facilities could not be accepted as a basis for justifying a delay but it did not intrude on the decision-making process of government, but rather recognized that the situation was unacceptable and suggested ways to redress it without incurring undue expense. The court noted that "the question is not whether courts can make decisions that impact on budgetary policy; it is to what degree they can appropriately do so. A remedy which entails an intrusion into this sphere so substantial as to change the nature of the legislative scheme in question is clearly inappropriate" (E/CN.4/2006/WG.23/2, para. 42).

C. The role of international treaty bodies

41. Questions similar to those concerning the role of the judiciary in the democratic order underlie claims that international treaty bodies cannot appropriately examine individual petitions on economic, social and cultural rights. This issue has taken on significance in the context of the continuing discussions on the drafting of an optional protocol to ICESCR. In considering the possible establishment of a system of individual petitions under a possible optional protocol, members of the working group have queried how a treaty body would assess compliance by a State party to its obligations under article 2, paragraph 1, in particular in relation to its adequate use of "the maximum of its available resources" to achieve the progressive realization of the rights in ICESCR (E/CN.4/2006/47, para. 91).

42. In this regard, it is relevant to review the approach of the Committee under the periodic reporting system to see how it might examine the adequate use of "the maximum available resources" under article 2, paragraph 1, of the ICESCR. While the Committee has not yet adopted an explicit approach or framework to address this, a review of its concluding observations indicates that it focuses particularly on the process of decision-making rather than seeking to replace the decision-making of the concerned State. In doing so, CESCR examines the decision-making process and surrounding influences that led to the allocation of resources according to a range of criteria to determine whether the State had acted in conformity with the Covenant. Those criteria include:

(a) The severity of the alleged violation — if the claim concerned an alleged violation of a minimum core obligation (or minimum core content), the onus is on the State party to indicate that it had made every effort to use all resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations;

(b) The development level of the country — the examination is on a case-by-case basis with a wider margin of discretion given to least developed State parties;

(c) Current economic influences — a State with a higher level of development might be going through a period of recession which might have to be considered;

(d) Other influences — for example, the presence of a natural disaster might have an impact on available resources and their allocation;

(e) The process of allocating resources — whether the allocation was non-discriminatory, directed towards grave threats to the enjoyment of rights and took into account as a matter of priority the needs of vulnerable, disadvantaged and marginalized people; and

(f) Proportionality — whether the allocation of resources to social expenditures was reasonably proportional to allocation in other areas.

43. When extrapolated to the context of a petition system under ICESCR, it is possible to imagine that the Committee would, if ever faced by an alleged violation due to the resource allocations of a particular State party, consider the decision-making process and adopt only general views, leaving a wide margin of discretion for States parties to decide on the appropriate allocation of resources so long as the process appears to take appropriately into account the State party's obligations concerning economic, social and cultural rights, particularly for the disadvantaged and those vulnerable to discrimination.

44. Questions of resource allocations have already been examined to some degree by other international treaty bodies in relation to civil and political rights. In *Womah Mukong v. Cameroon*,[22] the Human Rights Committee held the view "that certain minimum standards regarding the conditions of detention must be observed regardless of a State party's level of development. These include ... minimum floor space and cubic content of air for each prisoner, adequate sanitary facilities, clothing which shall be in no manner degrading or humiliating, provision of a separate bed, and provision of food of nutritional value adequate for health and strength. It should be noted that these are minimum requirements which the Committee considers should always be observed, even if economic or budgetary considerations may make compliance with these obligations difficult". Failure to meet these requirements would constitute a breach of the right to be free from torture and cruel, inhumane and degrading treatment. Consequently, the adjudication of economic, social and cultural rights does not necessarily raise any new questions concerning the role of international monitoring bodies.

45. The Committee could presumably provide suggestions on ways to remedy the situation — possibly even several suggestions of possible action — but the non-binding nature of these would still leave the democratically elected Government to adopt its own policy and make its own resource allocations so long as they conform to the provisions of the Covenant. Recommendations could suggest:

(a) Remedial action, such as compensation, to the victim as appropriate;

(b) Identification of parameters within which the State party could decide to act to remedy the circumstances leading to the breach. These parameters would include such things as: indication of overall priorities to ensure that resource allocation conformed with the State party's obligations under the Covenant;

provision for disadvantaged, vulnerable or marginalized people; protection against grave threats to the enjoyment of economic, social and cultural rights; respect for non-discrimination in the design and implementation of measures and so on;

(c) The suggestion of a range of measures to assist the State party in meeting its recommendations, with a particular emphasis on low cost measures, however, the State party would still be able to design its own measures; and

(d) The identification of a follow-up mechanism to ensure ongoing accountability of the State party, for example, by including a requirement that the State party explain the steps taken to remedy the violation in its next reporting cycle.

IV. Concluding remarks

46. **It is important to repeat that, while critical, legal protection need not be the only form of protection of economic, social and cultural rights. A range of other educational, social, budgetary, research, statistical and developmental projects and programmes all have a key role to play in bringing about positive change in the protection and promotion of economic, social and cultural rights. However, legal protection of these rights is an obligation for States and an essential part in the process of improving enjoyment of these rights. Constitutional and legislative recognition of economic, social and cultural rights ensures their place in the legal and social order and assists in identifying the core content of rights, comprehensive and transparent strategies to implement them and effective means to monitor implementation. The availability of judicial, quasi-judicial and administrative remedies provides a means of redress for those who have suffered breaches of their rights and stimulates greater respect for economic, social and cultural rights. Further, legal protection of economic, social and cultural rights through courts and other bodies has proven to be a means of clarifying the normative content of economic, social and cultural rights as well as promoting greater transparency and accountability of duty-bearers.**

47. **In this context, the drafting of an optional protocol to ICESCR also could stimulate strengthened legal protection of economic, social and cultural rights. While the transformative powers of petitions systems at the international level should not be overstated, communications procedures do have an impact at the national level by encouraging the provision of remedies, particularly where national remedies are insufficient, clarifying the nature and content of rights, and influencing national attempts at legal protection. ICESCR itself as well as the general comments of the CESCR have already had an effect on national protection of economic, social and cultural rights and an optional protocol would consolidate and strengthen these impacts.**

48. **Protection of all human rights, including through legal means, must ultimately be our goal. Poverty and exclusion lie behind many of the security threats that we face. Even in prosperous economies, many individuals live in conditions that amount to a denial of the human rights to which all human beings are entitled under international law. To reduce economic, social and cultural rights to mere policy objectives or moral commitments rather than legally binding obligations would deny their status as human rights and reduce**

the likelihood of their realization. Human rights embody an international consensus on the minimum conditions for a life in dignity. Respect for human rights requires legal frameworks at the national and international levels within which individuals and groups of individuals can claim their rights. Only that possibility will give human rights their full meaning.

Notes

[1] Article 1 of the African Charter, for example, states that "The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them".

[2] See United Nations document E/CN.4/SR.248, p. 26.

[3] *The Government of South Africa v. Grootboom*, Constitutional Court of South Africa, 2000, *ICHRL* 72.

[4] See for example, the Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security, paragraph 17 of which recognizes obligations on States to respect, promote and protect and to take appropriate steps to achieve progressively the full realization of the right to adequate food.

[5] Vienna Convention on the Law of Treaties (1969), art. 26.

[6] See e.g., *Olga Tellis & Ors v. Bombay Municipal Corporation*, AIR (1986), SC 180.

[7] General comment No. 3, "The nature of States parties' obligations" (art. 2, para. 1, of the Covenant), para. 3.

[8] *Regina v. Secretary of State for the Home Department (Appellant) ex parte Adam (FC) (Respondent)*, *UKHL* 66 (3 November 2005).

[9] See e.g., Council of Europe, "Execution of the European Court of Human Rights' judgments concerning social rights", Steering Committee for Human Rights, Working Group on Social Rights, March 2005 (GT-DH-SOC(2005)004).

[10] See e.g., Human Rights Committee, communication No. 182/1984, *FH Zwaan-de Vries v. The Netherlands*, views adopted on 9 April 1987 (CCPR/C/29/D/182/1984).

[11] For further discussion see "Making economic, social and cultural rights effective", Discussion Document, Irish Human Rights Commission, December 2005, pp. 86-90.

[12] For summaries of national, regional and international cases on economic, social and cultural rights, see e.g. the notes by the Secretariat prepared for the first, second and third sessions of the open-ended working group to consider options regarding the elaboration of an optional protocol to the ICESCR (E/CN.4/2004/WG.23/CRP.1, E/CN.4/2005/WG.23/2005/CRP.1, E/CN.4/2006/WG.23/2006/CRP.1).

[13] See e.g., *People's Union for Civil Liberties (PUCL) v. Union of India and Others*, Supreme Court of India, Writ Petition [Civil] No. 196 of 2001.

[14] Committee on Economic, Social and Cultural Rights, "The role of national human rights institutions in the protection of economic, social and cultural rights", general comment No. 10, (E/C.12/1998/25).

[15] OHCHR, "Economic, social and cultural rights — handbook for national human rights institutions", Professional Training Series No. 12, United Nations, New York and Geneva, 2005. Available at http://www.ohchr.org/english/about/publications/docs/train12_e.pdf at p. 27. See also: *Orissa Starvation Deaths Proceedings*, National Human Rights Commission of India, Case No. 37/3/97-LD, decision of 17 January 2003.

[16] Out of the seven main international human rights treaties, only the International Covenant on Economic, Social and Cultural Rights and the Convention of the Rights of the Child do not provide for such optional individual communications mechanisms.

[17] See e.g., Human Rights Committee, communication No. 182/1984, *FH Zwaan-de Vries v. The Netherlands*, views adopted on 9 April 1987 (CCPR/C/29/D/182/1984).

[18] Under the African Charter on Human and Peoples' Rights, the African Commission has considered communications involving, among others, the rights to health, education, favourable conditions of work and cultural life. See e.g., *Purohit and Moore v Gambia* — Communication 241/2001, African Commission on Human and Peoples' Rights; and *The Social and Economic Action Rights Centre & Anor v. The Federal Republic of Nigeria*, Communication 155/96, African Commission on Human and Peoples' Rights. Likewise, a collective complaints procedure exists under the European Social Charter, allowing national and international trade unions, employers' organizations and certain non-governmental organizations to lodge complaints with the European Committee of Social Rights. The American Convention on Human Rights and its Protocol of San Salvador, allow for individual in relation to the right to education and workers' human rights.

[19] See *Minister of Health v. Treatment Action Campaign*, Constitutional Court of South Africa, Case CCT 9/02; *People's Union for Civil Liberties (PUCL) v. Union of India and Others*, Supreme Court of India, Writ Petition [Civil] No. 196 of 2001; *Marchisio José Bautista y Otras — AMPARO*, Expediente No. 500004/36; *International Commission of Jurists v. Portugal*, Complaint No. 1/1998 — in United Nations, "Elements for an optional protocol to the International Covenant on Economic, Social and Cultural Rights", analytical paper by the Chairperson-Rapporteur, Catarina de Albuquerque, prepared for the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights (E/CN.4/2006/WG.23/2, para. 62).

[20] South African Court of Appeal 2002 (5) SA 721, 2002 10 BCLR 1033.

[21] Supreme Court of Canada, [1990] 2 S.C.R. 1199, 1990 CanLII 45 (S.C.C.) as well as *Schachter v. Canada* [1992] 2 S.C.R. 679, 1992 CanLII 74 (S.C.C).

[22] Communication No. 458/1991, decision adopted on 21 July 1994 (CCPR/C/51/D/458/1991, para. 9.3).